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No. 27

In the Supreme Court of the United States

OCTOBER TERM, 1946

BRUCE'S JUICES, INC., PETITIONER

v.

AMERICAN CAN COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Of the various questions raised by the parties in this case, the Government will discuss only the question whether, in a suit in a state court to recover on promissory notes given by a purchaser of goods, the purchaser may plead the defense that the goods were sold to him at discriminatory prices in violation of the Robinson-Patman Act. This issue is of concern to the Government since the nature and scope of the remedies available to private parties injured by violations of the law have an important bearing upon the extent to which the Act is observed and the policies sought to be achieved by Congress are effectuated. Both the petitioner and the respondent seem to be in agreement that deter-

mination of the question whether violation of the Act is available as a defense under the circumstances presented in this case will be of far-reaching consequence.

The policy of fostering competition in interstate commerce has been declared by Congress in a series of acts known as the antitrust laws, of which the Robinson-Patman Act (49 Stat. 1526) is an integral part.[1] In recognition of the serious enforcement problem which these acts pose, Congress has provided a wide variety of remedies. Certain activities, including intentional discrimination in price between different purchasers,[2] are made criminal. Both the Government and private parties are authorized to bring suit in the federal courts to restrain violations of the prohibitory provisions of the Sherman Act and Clayton Act (including Section 2 as amended by the Robinson-Patman Act), and any person injured by reason of anything forbidden by these acts may bring suit in the federal courts for the recovery of treble damages.[3]

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[1] Section 1 of the Act amends Section 2 of the Clayton Act, Section 2 deals with pending litigation and outstanding orders of the Federal Trade Commission based on Section 2 of the Clayton Act, and Section 3 makes criminal, under certain conditions, price discriminations and sales at unreasonably low prices.

[2] Section 3 of the Robinson-Patman Act (15 U. S. C. 13a).

[3] Sherman Act, Sec. 4 (15 U. S. C. 4); Clayton Act, Secs. 4, 15, 16 (15 U. S. C. 15, 25, 26). The Federal Trade Commission is also given jurisdiction to bring administrative proceedings to prohibit violations of the Clayton Act (Clayton Act, Sec. 11, 15 U. S. C. 21).

The antitrust laws do not expressly grant to one injured by a violation the right to interpose such violation as a defense to a suit by the violator. But the validity of such a defense was early recognized as against the contention that the enforcement provisions embodied in the Sherman Act provided exclusive remedies for violation of that Act. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 87.

A violation of the antitrust laws does not, by that fact alone, make the violator a pariah unable to enlist the aid of the courts under any circumstances, however unrelated to his violation. Two leading cases form the framework for determining the propriety of a defense based upon the plaintiff's violation of the antitrust laws. In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, where the seller of goods brought suit upon notes given on account of the purchase, a defense that the seller was a party to an illegal combination in restraint of trade forbidden by the Sherman Act was rejected upon the ground that the sales contracts on which suit was brought were collateral to this illegal combination and were therefore enforceable. In *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, where the suit was to recover a balance owing for goods sold and delivered, the Court upheld the defense that the sale of these goods was in furtherance of and in execution of a combination formed by the seller

and others, to restrain and monopolize interstate commerce. This Court declared (p. 261): "If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination." The Court said further (p. 262) that failure to allow the defense set up by the purchaser would be a departure from the long-established rule that a court will not lend its aid "to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality."

In several recent cases this Court has permitted private litigants to invoke the policy of the antitrust laws in limitation of rights asserted by the plaintiff, because of the public interest deemed to be subserved thereby.* But the broad principle underlying the *Wall Paper* case is not confined to cases in which the defense is based on violation of the antitrust laws. A court which enforces any illegal contract becomes a party to such illegality; and judicial forbearance in such circumstances serves the additional practical purpose of helping reduce the number of illegal contracts which might otherwise be made. *McMullen* v. *Hoffman*, 174 U. S. 639, 669–670.

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* *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495; *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488.

In the light of the foregoing general principles, we return to the question whether in a suit in a state court to recover the purchase price of goods sold and delivered, the purchaser may assert as a defense that the goods were sold to him at discriminatory prices in violation of the Robinson-Patman Act. Preliminarily, it may be observed that this is clearly a question of federal law. What constitutes a violation of a federal statute, and the legal implications of such violation, depend upon federal law, whether the forum be a federal or state court. This principle is too well established to require documentation, but for applications of it involving the antitrust laws, see *Bement* v. *National Harrow Co.*, 186 U. S. 70, and *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173. The Robinson-Patman Act is as much the law of the State of Florida as its code of domestic relations; and whether the contractual liability of a Florida defendant in a Florida court is affected by the circumstance that the contract on which the suit is based is in violation of the Robinson-Patman Act depends, ultimately, upon the proper construction to be given that Act. Congress might explicitly have incorporated into the Act the settled judicial principle that no court, federal or state, should lend itself to the enforcement of contracts in violation of the antitrust laws. On the other hand, Congress might conceivably have provided that the remedies expressly specified in

the antitrust laws should be exclusive, and that a violation of such laws should be immaterial in determining the rights and liabilities of private parties *inter se*. Or Congress might have adopted a neutral position by providing that the states should be wholly free to devise their own policy as to whether the facilities of their courts are to be used for the enforcement of agreements unlawful under the Robinson-Patman Act, and that the Act should place the states under no compulsion whatsoever in this regard. For reasons which we shall state shortly, it is our view that the Robinson-Patman Act is to be construed as permitting a defense based upon violation of its provisions; but, at all events, the availability of such a defense is clearly a federal question for determination by this Court.

The question for decision divides itself into two parts:

(1) Is this a suit to enforce a contract which is illegal under the Robinson-Patman Act, or is it based upon a cause of action collateral to the plaintiff's alleged violation of the statute?

(2) If the former, to what extent does the Robinson-Patman Act affect the enforcement by state courts of contracts in violation of its provisions?

(1) As to the first question, it should be noted that petitioner's answers alleged that the notes on which suit is brought evidenced the purchase

price of goods sold to it in violation of Section 3 of the Robinson-Patman Act (15 U. S. C. 13a)[5] and Section 2 of the Clayton Act as amended by the Robinson-Patman Act (and particularly subdivision (a) thereof (15 U. S. C. 13 (a)).[6] The former section makes it unlawful knowingly to discriminate against competitors of a purchaser by granting to the purchaser discounts or rebates not available to his competitors, and Section 2 (a) of the Clayton Act makes it unlawful to discriminate in price between different purchasers of commodities of like grade and quality.

Essentially what is prohibited by each section is sale of goods to different purchasers at different prices. The prohibited price discrimination is not limited to contracting to sell at varying prices but includes collection of the agreed higher and lower sales prices. Accordingly, when goods have been concurrently sold at different and discriminatory prices, a suit to recover the purchase price is not only based on an illegal sales agreement but is an attempt to enlist the aid of the courts in doing what the statute prohibits, that is, collection of different and discriminatory prices from differ-

[5] See the second, third, fourth, eighth, and ninth pleas to the declaration in Case No. 23454–L (R. 5–7, 10–12) and the third, fourth, and fifth pleas to the declaration in Case No. 23569–L (R. 43–45).

[6] See the first and sixth pleas to the declaration in Case No. 23454–L (R. 4–5, 8–9) and the first plea to the declaration in Case No. 23569–L (R. 41–42).

ent purchasers for goods of like kind and quality. The cause of action is clearly not collateral to the seller's illegal conduct since the very judgment which is sought falls within the area of illegality defined by the statute. The fact that the suit does not embrace all elements of the plaintiff's offense appears to be immaterial. Sale at the higher price being, like sale at the lower price, a part of the offense, any court giving judgment for the higher sales price is aiding in the commission of the offense.

(2) The question whether Congress, when it passed the Robinson-Patman Act, intended that those injured by its violation should be confined to such relief as the antitrust laws expressly provide would seem to be conclusively answered by the decisions previously cited, holding that the specific statutory remedies for enforcement of the Sherman Act do not limit the application of the more general rule that courts will not entertain a suit which is shown to be grounded upon and in execution of an illegal agreement (*supra*, pp. 3–4). As to the criminal provisions of Section 3 of the Robinson-Patman Act, there is even less reason than in the case of the Sherman Act for concluding that Congress intended the statutory remedy to be exclusive.[7] Likewise, when the Robinson-Patman Act amended Section 2 of the Clayton Act by extend-

[7] If, as seems clear, Section 3 falls within the words "antitrust laws" as defined in Section 1 of the Clayton Act (15 U. S. C. 12), the sanctions are the same as those of the Sher-

ing its coverage but made no change in the existing remedies for enforcement of that and other sections of the Clayton Act, whatever rights of defense were available in a suit in which the cause of action was grounded upon the plaintiff's violation of the Clayton Act were as much available after the amendment of Section 2 as before. As to such right of defense, the decisions previously cited dealing with the Sherman Act must be deemed controlling. The two statutes are in *pari materia,* the later one supplementing prohibitions of the earlier one by providing for outlawing in their incipiency certain conduct which was thought likely to lead to the restraints of trade and monopolies against which the Sherman Act is directed. *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 356.

The respondent appears to argue that policy considerations dictate a different conclusion. Starting from the premise that the question whether the Robinson-Patman Act has been violated is of great economic complexity, the respondent concludes that this determination, if not beyond the competence of the courts, is at least one with which they should not be burdened. But Congress clearly did not intend to remove this question from the courts, which

man Act. But if Section 3 is not within these words, the only sanction is the criminal penalty for violating the section, whereas Congress has provided that the Sherman Act may be enforced by criminal proceedings, by civil proceedings to enjoin future violations, and by triple damage suits to recover thrice the injury caused by past violations.

must pass upon the question in proceedings to enjoin violations of Section 2 of the Clayton Act and in triple damage suits for the recovery of injury caused by violation of that section. In addition, it would be strange that a defense to an action, however meritorious in itself, should be unavailable merely because it poses difficult and complex questions.

The respondent argues that state courts do not constitute a convenient or appropriate forum for trying questions as to violation of the Robinson-Patman Act. No such ground, however, was given by the Supreme Court of Florida in rejecting petitioner's defense. In passing upon this argument, the Court should bear in mind that if the defense asserted by petitioner is not available, the only recourse of those injured by prior violations of the statute is a treble-damage suit in a federal district court. The question of the convenience of the forum therefore presents, not a choice between administrative and judicial determination of the issue of violation, but choice between the treble-damage suit in a federal court as an exclusive or nonexclusive medium for trying this issue. In a treble-damage suit the injured party must establish not only the defendant's violation of the Act but also the extent and nature of the plaintiff's injury, the jurisdiction of the court, and that the statute of limitations does not bar the action. A forum in which any or all of these additional issues may have to be tried, and a forum in which the recovery sought in-

cludes the element of punitive damages, does not appear to be either more convenient or appropriate than the forum provided when suit is brought, either in a state or federal court, to enforce an obligation arising out of violation of the statute.

The only remaining question is whether, in a suit in a state court, the right to interpose plaintiff's violation of the Act by way of defense is affirmatively secured to the defendant by the federal law, or is left by that law to be determined in accordance with state policy. The question was dealt with in *Bement* v. *National Harrow Co.*, 186 U. S. 70, which was a suit brought in a state court to enforce a contract. The state court rejected the defense that the contract violated the Sherman Act, and this Court affirmed upon the ground that the contract did not, upon the evidence presented, violate the Sherman Act. But this Court asserted in unqualified terms, presumably as a matter of federal law, the right to make such defense in the state courts. The Court said (p. 88) that "any one sued upon a contract may set up as a defence that if is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action." The Court also said (*ibid.*): "As the statute makes the contract in itself illegal, no recovery can be had upon it when the defence of illegality is shown to the court." The Court further said (*ibid.*) that the provision by Congress of certain statutory remedies against violators "does not prevent a

private individual when sued upon a contract which is void as in violation of the act from setting it up as a defence."

Any remaining doubt on the question seems to be set at rest by *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173. That case held that where the doctrine that a licensee of a patent is estopped to challenge the validity of the licensed patent is invoked so as to conflict with the Sherman Act's prohibition of price fixing, "this Court may resolve the question even though its conclusion be contrary to that of a state court". The Court, after referring to the *Bement* case, the *Wall Paper* case and other authorities, said (p. 177):

> Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements.

The state courts have consistently upheld the right to interpose as a defense that the plaintiff's cause of action is grounded upon an agreement or transaction prohibited by the Sherman Act,[8] the Clayton Act[9] or Section 2 of the Clayton Act as modified by the Robinson-Patman Act.[10]

The Government submits that, for the reasons stated, the petitioner was entitled to plead respondent's violation of the Robinson-Patman Act

See footnotes on opposite page.

by way of defense to the suits brought against it in the Florida courts. The question whether recognition of the defense asserted by petitioner might work inequities as between the parties would seem to lie outside the issues before this Court. In any event, we do not suggest that such recognition implies that the respondent could not recover on a *quantum meruit* basis.

Respectfully submitted.

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[9] *Morey* v. *Paladini*, 187 Cal. 727; *Patterson* v. *Imperial Window Glass Co.*, 91 Kans. 201; *Schill* v. *Remington-Putnam Book Co.*, 182 Md. 153; *Stewart* v. *W. T. Rawleigh Medical Co.*, 58 Okla. 344. Cf. *Butterick Pub. Co.* v. *Mistrot-Munn Co.*, 153 N. Y. S. 61, affirmed, 217 N. Y. 678—defense of violation of antitrust act of another state; *Kissel Motor Car Co.* v. *Walker*, 270 Fed. 492 (C. C. A. 5)—violation of state antitrust law.

[10] *Ainsworth* v. *Cooper Underwear Co.*, 237 N. Y. S. 301; *Remington Rand, Inc*, v. *International Business Mach. Corp.*, 3 N. Y. S. 2d 515.

[11] *Body-Steffner Co.* v. *Flotill Products*, 63 Cal. App. 2d 555; *Merchants Service Corp.* v. *Libby, McNeill & Libby*, 314 Ill. App. 121; *F. W. Stock & Sons, Inc.* v. *Jacobson*, 18 N. Y. S. 2d 200. *Contra, Progress Corp.* v. *Green*, 298 N. Y. S. 154.

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